

*United States Court of Appeals  
for the Second Circuit*



**APPENDIX**



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**Docket  
No. 75-6043**

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**IN THE  
United States Court of Appeals  
For the Second Circuit**

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LAURENCE F. KELLY, as Administrator of the Estate of  
RICHARD C. KELLY,

*Plaintiff-Appellant,*

—vs.—

UNITED STATES OF AMERICA,

*Defendant-Appellee.*

—  
On Appeal from the United States District Court for the  
Northern District of New York

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**APPELLANT'S APPENDIX**

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OOT, GREENE, SETRIGHT,  
HERSHDORFER & SHARPE  
*Attorneys for Plaintiff-Appellant,*  
*Laurence F. Kelly*  
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## COMPLAINT.

STATE OF NEW YORK  
FEDERAL COURT

NORTHERN DISTRICT

LAURENCE F. KELLY, as Administrator of the Estate  
of RICHARD C. KELLY,

Plaintiff,

-vs-

UNITED STATES OF AMERICA,

Defendant.

The plaintiff, complaining of the defendant herein,  
alleges as follows:

1. This action arises under the Federal Tort Claims Act, 28 USC §§ 1346(b), 2671 et seq., as hereinafter more fully appears.
2. That the plaintiff resides in the above entitled judicial district.
3. Plaintiff is the duly appointed, qualified and acting administrator of the Estate of Richard C. Kelly, deceased, who died in the manner alleged below, on September 4, 1970; Plaintiff is duly authorized by the Surrogates Court of Onondaga County, State of New York, to bring this action on behalf of and for the benefit of the next of kin of Richard C. Kelly, deceased, and of and for the benefit of Richard C. Kelly, deceased. At the time of his death, Richard C. Kelly was survived by Laurence F. Kelly, father; Marie Kelly, mother; Laurene Marie Matheney, sister; William Gerard Kelly, brother; David Michael Kelly, brother; Laurence F. Kelly, Jr., brother; Mary Elizabeth Kelly, sister; and Catherine Anne Kelly, sister.
4. The circumstances upon which this claim is based are as follows: Upon information and belief, the accident occurred at approximately 12:00 noon on September 4, 1970. The deceased, Richard Kelly, was on a sailboat two or three miles offshore when the sailboat capsized. At that time he was accompanied by Dr. Daniel Koretz, Donna Fater, and Zeba Galili. All four passengers had life vests on and clung to the boat. Waves made

## Complaint.

it impossible for them to right the craft. Subsequently the boat was spotted from the shore by witnesses, among whom was Martin Vosburgh who felt it was not necessary to contact the Coast Guard since the boat was clearly within sight of the Sodus Point Coast Guard Station. It is further believed that the boat was within view of the Sodus Point Coast Guard Station for at least five hours before any effort was made to rescue the party. Relying on the Coast Guard to act, no efforts were made at that time (5:15 P.M.) on the part of the civilian observers to attempt rescue on their own. The Coast Guard made no response. The Coast Guard Station was then called at 6:45 P.M. Again nothing was done by the civilian observers since they relied on the representations of the Coast Guard. No effort was made by the Coast Guard to attempt rescue. Finally, the State Police were called and only after they in turn contacted the Coast Guard about 7:30 P.M. did the Coast Guard make any attempt to rescue them. Mr. Kelly was reached an hour later when their attempt to retrieve him resulted in his submersion and disappearance below the surface of the water. His body was finally recovered several days later.

5. The negligence and/or willful failure to act on the part of the employees of the Coast Guard Station at Sodus Point was a direct and proximate cause of the extent of pain and suffering and ultimate death of Mr. Kelly. The boat was visible for several hours to the Sodus Point Coast Guard Station and no action was taken by them to rescue the party. The civilian observers relied on the Coast Guard and on the representations made by the employees of the Coast Guard that something would be done. Mr. Kelly and those with him also relied on expected aid from the Coast Guard Station which was within their sight, but none was rendered for several hours, during which time Mr. Kelly experienced extreme pain and suffering which ultimately continued until his death.

6. As a result of the aforementioned the plaintiff has

## Complaint.

been damaged in the amount of Three Hundred Thousand Dollars (\$300,000.00).

7. On August 31, 1972, plaintiff filed a claim for administrative settlement with the Commander of the Ninth Coast Guard District, 1240 East Ninth Street, Cleveland, Ohio, in the sum of \$300,000.00.

8. On October 30, 1972, plaintiff's claim was finally denied by the Coast Guard in writing, sent to the plaintiff's attorney by registered mail.

WHEREFORE, plaintiff demands judgment against the defendant in the amount of \$300,000.00, together with the costs and disbursements of this action.

OOT, GREENE, SETRIGHT,  
MERRSHDORFER & SHARPE  
Attorneys for Plaintiff  
Office & P.O. Address  
500 Powelson Building  
Syracuse, New York 13202  
Phone: (315) 422-8231

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ANSWER.

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

LAURENCE F. KELLY, )  
as Administrator of the )  
Estate of RICHARD C. KELLY, )  
Plaintiff, )  
v. ) CIVIL ACTION  
UNITED STATES OF AMERICA, ) NO. 73-CV-106  
Defendant. )

ANSWER

For its answer to the complaint of plaintiff Laurence F. Kelly, as Administrator of the Estate of Richard C. Kelly, defendant the United States of America alleges on information and belief as follows:

FIRST DEFENSE

1. Plaintiff's complaint alleges an admiralty and maritime claim within the meaning of Rule 9(h), Federal Rules of Civil Procedure, as hereinafter more fully appears.

2. This Honorable Court is without jurisdiction over the defendant or over the subject matter of the action for the reason that plaintiff's action was not commenced within two years after the cause of action arose, as prescribed by the provisions of the Suits in Admiralty Act, as amended, 46 U.S. Code 741-752, and particularly Section 5 thereof, 46 U.S. Code 745.

SECOND DEFENSE

3. Defendant repeats and realleges the allegations of paragraph 1 of its First Defense.

## Answer.

4. Denies the allegations of paragraph 1 of the complaint, for the reason that plaintiff's exclusive remedy against the United States of America is that afforded by the provisions of the Suits in Admiralty Act, as amended, 46 U. S. Code 741-752.

5. Denies the allegations of paragraph 2 of the complaint for lack of sufficient knowledge or information.

6. Denies the allegations of paragraph 3 of the complaint for lack of sufficient knowledge or information.

7. Denies the allegations of paragraph 4 of the complaint.

8. Denies the allegations of paragraph 5 of the complaint.

9. Denies the allegations of paragraph 6 of the complaint.

10. Denies the allegations of paragraph 7 of the complaint, except admits that on September 5, 1972, the Commander of the Ninth Coast Guard District received from plaintiff's attorney a "Claim for Damage, Injury, or Death", dated August 31, 1972, in the sum of \$300,000, and defendant refers to said document for its contents.

11. Denies the allegations of paragraph 8 of the complaint, except admits that by letters dated September 26, 1972, and October 30, 1972, addressed to plaintiff's attorney, the United States Coast Guard denied plaintiff's claim as being barred by statute of limitations, and

Answer.

defendant refers to said documents for their contents.

WHEREFORE, defendant the United States of America  
prays that plaintiff's action be dismissed with costs  
in favor of defendant.

JAMES M. SULIVAN, JR.  
United States Attorney  
Syracuse, New York 13201

Assistant United States Attorney

*Anthony W. Gross*  
Anthony W. Gross, Trial Attorney  
Admiralty & Shipping Section  
U.S. Department of Justice  
Washington, D.C. 20530

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Answer.

CERTIFICATE OF SERVICE

I certify that on May 21, 1973, I mailed,  
postage prepaid, a copy of the foregoing Answer to  
the Attorneys for Plaintiff at the following address:

OOT, GREENE, SETRIGHT, HERSHDORFER  
& SHARPE  
500 Powelson Building  
Syracuse, New York 13202

*Anthony W. Gross*  
ANTHONY W. GROSS, Trial Attorney

INTERROGATORIES PROPOUNDED BY DEFENDANT  
TO PLAINTIFF.

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

LAURENCE F. KELLY,  
as Administrator of the  
Estate of RICHARD C. KELLY, }  
Plaintiff, }  
v. } CIVIL ACTION NO.  
UNITED STATES OF AMERICA, } 73-CV-106  
Defendant. }

INTERROGATORIES PROPOUNDED BY  
DEFENDANT TO PLAINTIFF

Defendant the United States of America propounds the following interrogatories to be answered under oath by plaintiff Laurence F. Kelly within thirty days after service hereof in accordance with Rule 33 of the Federal Rules of Civil Procedure:

1. Please state your full name, the date and place of your birth, your present residence address, your present occupation and your Social Security number.
2. Please state whether an executor, administrator or other personal representative has been appointed for decedent's estate, and, if so, please state the name and address of said personal representative and when and by what court or other authority said personal representative was appointed or qualified. (Please attach a copy of the appointment to your answers to interrogatories.)
3. Please state whether your decedent left a will, and, if so, state when and by what court the same was offered for probate.

## Interrogatories Propounded by Defendant to Plaintiff.

4. Please state the full name and date and place of birth of your decedent.

5. Please state the occupation, legal residence address and Social Security number of your decedent at the time of his death.

6. Please state the complete addresses of all places at which your decedent had resided during the five-year period prior to his death.

7. Please state the educational background of your decedent, listing all schools attended in chronological order, giving the dates of attendance and graduation, a description of any degree received, if any, and the address and location of each such school.

8. Please state the full names, relationships and birth dates of all persons residing with the decedent or in his household at the time of his death.

9. Please state the full name, birth date, place of birth, present address, Social Security number, present occupation and relationship to your decedent of all individuals it is claimed were dependent upon him for support on the date of his death.

10. Please state the name and present address of any and all employers of each dependent listed in your answer to Interrogatory No. 9 for the five-year period prior to decedent's death and for the period subsequent thereto to date.

11. Please state whether any of the dependents listed in your answer to Interrogatory No. 9 had any source of income other than that received from their employers or from your decedent, and, if so, state the

## Interrogatories Propounded by Defendant to Plaintiff.

source of said income and the amount of said income received per week, month or year by each said dependent.

12. Please list all banks or other institutions in which decedent and each dependent listed in your answer to Interrogatory No. 9 maintained an account, whether solely in his own name or jointly with decedent or some other person, identifying each said account in complete detail.

13. Please state the total compensation attributed to each dependent listed in your answer to Interrogatory No. 9 as wages, salary or other compensation on each Federal income tax return filed by or on behalf of each said dependent for calendar years 1965, 1966, 1967, 1968, 1969, 1970, 1971 and 1972.

14. Please state whether your decedent was ever a member of the Armed Forces of the United States, and, if so, state your decedent's branch of service, service serial number and the dates and places of induction and discharge and the type of discharge or separation received.

15. If the answer to Interrogatory No. 14 is in the affirmative, please state whether your decedent had a service-connected disability, and, if so, please state:

- (a) the precise nature of the disability;
- (b) the percentage of the disability at the time of separation from the service; and
- (c) the percentage of the disability at the time of his death.

Interrogatories Propounded by Defendant to Plaintiff.

16. If the answer to Interrogatory No. 14 is in the negative, please state whether your decedent was ever given a medical examination for entry into military service, and, if so, give the dates and places and state the results of said examinations.
17. Please state whether any application of your decedent for life insurance coverage had ever been denied for reasons of his health or physical condition, and, if so, please state the name and address of all physicians performing medical examinations of your decedent with respect to said life insurance applications and the date and place of said examinations.
18. Please state whether your decedent had taken out any life insurance protection within the five-year period prior to his death, and, if so, please state the company and policy number, the name and address of all physicians performing medical examinations of your decedent with respect to applications for said life insurance, the date and place of said examinations, and the name and address of the present custodian of the record of said examinations.
19. Please list in chronological order each and every employer of your decedent from January 1, 1965, to the date of his death, giving the name and address of each employer, the nature of employment and the job description held by your decedent, the places of employment and the dates between which he was employed on each job description by each such employer.
20. Please state the exact weekly, monthly or annual salary or wage received by your decedent from each

## Interrogatories Propounded by Defendant to Plaintiff.

employer or on each job listed in your answer to Interrogatory No. 19.

21. Please state whether any sums were deducted as an allotment for the benefit of any dependent or otherwise from said salary or wages by any employer listed in your answer to Interrogatory No. 19 above at any time, and, if so, state the employer or employers who deducted such an allotment, the dates between which such an allotment was paid, the monthly amount of each such allotment and the total amount of allotments so paid during calendar years 1965, 1966, 1967, 1968, 1969 and 1970.

22. Please state whether your decedent obtained or received income from any source other than wages or salary during the period between January 1, 1965, and the date of his death, and, if so, please state the sources of said income in detail and the amount of said income received per week, month or year by your decedent.

23. Please state the total compensation attributed to your decedent as wages, salary or other compensation on each Federal income tax return filed by or on behalf of your decedent for calendar years 1965, 1966, 1967, 1968, 1969 and 1970.

24. Please state whether, when, where and by whom a death certificate was issued with respect to your decedent.

2 If your answer to Interrogatory No. 24 is in the affirmative, please quote exactly from said death certificate the time and cause of death as stated thereon.

## Interrogatories Propounded by Defendant to Plaintiff.

26. Please state whether your decedent or anyone on his behalf kept records of his personal or family finances, and, if so, identify said records in reasonable detail, state the name of the person who kept them, and state the name and address of the person presently having custody of the same.

27. Please state the total annual sums contributed by your decedent to or for the benefit of each dependent listed in the answer to Interrogatory No. 9, separately stating said sums as to each said dependent, during calendar years 1965, 1966, 1967, 1968, 1969 and 1970.

28. Please itemize in detail all expenses incurred by reason of your decedent's death for which recovery is sought in this action, and, with respect to each item of expense listed, state the nature and the amount thereof, the name and address of each person or firm charging such expense, the date and identification of the bill by which such charge was made and the name of the person making such payment.

29. Please set forth a detailed breakdown and computation of the damages which you claim from defendant herein.

30. Please state whether any insurance company or other person or organization has any interest in your claim in this proceeding or any recovery herein by way of subrogation, assignment or otherwise, and, if so, state the name and address of each such company, person or organization and the nature and amount of any such claimed interest.

## Interrogatories Propounded by Defendant to Plaintiff.

31. Do you or any of your children have any suits pending against any persons, corporations or other suable entity for damages caused by the death of your decedent? If so, identify with particularity the defendant or defendants, the court and the docket number of the suit or suits.

32. Had your decedent ever been aboard the sailboat referred to in your complaint prior to September 4, 1970? If so, please state the respective dates and the number of such times aboard the sailboat.

33. State the name and address of the owner, on September 4, 1970, of the sailboat referred to in your complaint.

34. State the name and address of the present owner of the sailboat referred to in your complaint.

35. State the precise location of the sailboat referred to in your complaint at the time it capsized.

36. State the present address of each of the following persons: Dr. Daniel Koretz, Donna Fater, Zeba Galili and Martin Vosburgh.

37. Describe the type or types of life preservers on board the sailboat on September 4, 1970, the manufacturer of each type and the number of each type aboard the sailboat.

38. With respect to the life preservers mentioned in your answer to Interrogatory No. 37, state the name and address of the person or persons who now have possession of such preservers.

## Interrogatories Propounded by Defendant to Plaintiff.

39. (a) State the name and address of the witnesses you refer to in the statement in paragraph 4 of your complaint to the effect that "subsequently the boat was spotted from the shore by witnesses". (b) State the time or times of day such witnesses are claimed to have spotted the sailboat.

40. State the facts upon which you rely for your statement that the shore witnesses relied upon the Coast Guard to act (as stated in paragraph 4 of your complaint).

41. With respect to your statement (in paragraph 4 of your complaint) that "the Coast Guard made no response", state the events, occurrences, actions and/or conversations to which you claim the Coast Guard should have responded.

42. (a) State the name and address of the person or persons whom you claim called the Coast Guard at 6:45 P.M., September 4, 1970. (b) State the name of (or otherwise identify) the Coast Guard personnel who you claim participated in such call.

43. With respect to the alleged "call" of 6:45 P.M. to the Coast Guard, state the substance of the conversation, including the statements made by the Coast Guard personnel.

44. (a) State the name and address of the person who called the State Police, as alleged in paragraph 4 of your complaint. (b) State the name of (or otherwise identify) the State Police personnel who participated in such conversation. (c) State the substance of such conversation.

45. (a) State the name and address of (or otherwise identify) the State Police personnel who, you claim,

## Interrogatories Propounded by Defendant to Plaintiff.

called the Coast Guard at about 7:30 P.M. (b) State the name of (or otherwise identify) the Coast Guard personnel who you claim participated in such conversation. (c) State the substance of such conversation.

46. (a) State the physical condition of your decedent at the time the Coast Guard personnel reached him. (b) At that time, was your decedent alive or dead? (c) State the facts upon which you rely for your answers to parts (a) and (b) of this Interrogatory.

47. (a) Do you claim that, subsequent to the time when the Coast Guard personnel reached your decedent, any actions or omissions on the part of the Coast Guard personnel worsened your decedent's condition in any manner? (b) If so, please state the facts upon which you rely for such claims, and state in detail in what respects your decedent's condition was worsened.

48. At the time the Coast Guard personnel reached your decedent, was a life preserver or life vest properly secured to your decedent?

49. State the facts upon which you rely for your allegations (in paragraph 5 of your complaint) that "the civilian observers relied on the Coast Guard and on the representations made by the employees of the Coast Guard that something would be done."

JAMES M. SULLIVAN, JR.  
United States Attorney  
Syracuse, New York 13201

Assistant United States Attorney

ANTHONY W. GROSS, Trial Attorney  
Admiralty & Shipping Section  
Department of Justice  
Washington, D.C. 20530

Interrogatories Propounded by Defendant to Plaintiff.

CERTIFICATE OF SERVICE

I certify that on June 1, 1973, I mailed, postage prepaid, a copy of the foregoing Interrogatories to the attorneys for plaintiff at the following address:

Oot, Greene, Setright, Hershderfer & Sharpe  
500 Powelson Building  
Syracuse, New York 13202

Anthony W. Gross

## BILL OF PARTICULARS.

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

LAURENCE F. KELLY,  
as Administrator of the  
Estate of RICHARD C. KELLY,

Plaintiff,

-vs-

UNITED STATES OF AMERICA,

Defendant. Civil Action No.  
73-CV-106

The plaintiff, LAURENCE F. KELLY, as Administrator of the Estate of RICHARD C. KELLY, answering the interrogatories submitted by defendant herein, alleges as follows:

1. Laurence F. Kelly, 7/26/24, Rochester, New York  
31 Brown Street, Baldwinsville, New York, Applications Manager, General Electric Company, Syracuse, New York, 088-18-1824.
2. Administrator has been appointed; Laurence F. Kelly, 31 Brown Street, Baldwinsville, New York; appointed December 23, 1970 by Judge Ormand N. Gale, Temporary Acting Surrogate for the Surrogate's Court of the County of Onondaga, New York.
3. No will.
4. Richard C. Kelly, 1/28/46, Rochester, New York.
5. Student; 564 Mount Hope Avenue, Rochester, New York; 059-38-0593.
6. Fordham University, New York City  
University of Rochester Medical School, Rochester, New York  
500 block of Beach Avenue, Rochester, New York  
31 Brown Street, Baldwinsville, New York  
564 Mount Hope Avenue, Rochester, New York
7. Saint Mary's Grammar School, Baldwinsville, New York (1960)  
Baker High School, Baldwinsville, New York (1964), Regents Diploma  
Fordham University, New York City, (Fall, 1964 - Spring, 1968) Bachelor of Science in Chemistry  
University of Rochester Medical School until time of death, completed one year (1968-69)
8. Another student, no relationship to deceased.
9. None.
10. Not applicable.

## Bill of Particulars.

11. Not applicable.
12. Lincoln Rochester Trust Company, checking account #2894640, in his name only.
13. Not applicable.
14. No.
15. Not applicable.
16. Unknown if decedent ever given a medical examination.
17. No.
18. Yes, policy issued as result of employment with Eastman Kodak Company, Rochester, New York; examination taken approximately July, 1969 at Eastman Kodak Company; physician performing same unknown; policy number unknown.
19. Fall, 1964 through Spring, 1968, student at Fordham University, New York City, New York; Fall, 1968 through Spring, 1969, student at University of Rochester Medical School, Rochester, New York; 1969 through 1970, Eastman Kodak Company, Rochester, New York, chemist in Synthetic Chemicals Division; Fall, 1970, student at University of Rochester Medical School, Rochester, New York.  
Various part-time employment while at school and in the summers to contribute toward room and board.
20. Eastman Kodak Company, salary approximately \$9,200 per year.
21. None.
22. None.
23. Not available; estimated \$9,200 per year at Eastman Kodak Company.
24. Yes, September 14, 1970, Wolcott, New York, Miriam J. Hayward, Registrar of Vital Statistics.
25. Asphyxiation due to submersion.
26. None kept.
27. Not applicable.
28. Fireside Inn, Baldwinsville, New York, \$75.36, funeral lunch on September 15, 1970, paid by Laurence F. Kelly;  
Allstate Insurance, Rochester, New York \$83, car insurance, September 19, 1970, paid by Laurence F. Kelly  
St. Mary's Church, Baldwinsville, New York, \$175 cemetery charge, October 9, 1970, paid by Laurence F. Kelly  
Falardeau Funeral Home, Baldwinsville, New York, \$731, funeral, October 9, 1970, paid by Laurence F. Kelly  
Sam's Moving, Rochester, New York, \$70, to move

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Bill of Particulars.

piano to storage, November 7, 1970, paid by Laurence F. Kelly;

Sears Roebuck, Rochester, New York, \$19.67, revolving charges, December 5, 1970, paid by Laurence F. Kelly;

Durands Rent-All, Rochester, New York, \$34.25, lost tent in accident, December 6, 1970, paid by Laurence F. Kelly;

29. Medical and related expenses as outlined in paragraph 28 herein, plus pain, suffering and wrongful death actions in amounts to be determined by the jury at the time of trial.
30. New York State Higher Education Assistance Corporation - loan reimbursement asked in the amount of \$4,800.
31. None, other than the instant case.
32. Yes, approximately two or three times a week during summer months, 1968 on.
33. Owned jointly by decedent and Doctor Daniel Joel Koretz, 107 Ontario-on-the-Lake, Ontario, New York, 14519
34. Mr. Dan Tomlinson, 2390 Lake Road, Ontario, New York, 14519.
35. Two or three miles offshore near the Sodus Point Coast Guard Station.
36. Upon information and belief, last known addresses were:

Doctor Daniel Koretz, 107 Ontario-on-the-Lake,  
Ontario, New York 14519

Donna Fater, 439 Howland Canal, Venice, California,  
90291

Zeva Galili, 309 West 76th Street, New York City

Martin Vosburgh, Port Bay, Wolcott, New York
37. Four Mae West Type Life Preservers, Type I, Buoyant Vest Model AK1 Adult; Coast Guard No. 160.047/330/0 manufactured by Crawford Manufacturing Company, Richmond, Virginia

One, U.S. Air Force Surplus 1-Man life raft

Three, Buoyant Cushions 15 in. by 15 in. by 2, containing 20-ounce kapok, approved motorboats A-1 or 2 Coast Guard No. 160,048/221/0, manufactured by Buddy Schoellkopf Products, Dallas, Texas, style 6776.
38. Doctor Daniel Koretz has possession of two of the Mae West type life preservers, the U.S. Air Force

## Bill of Particulars.

Surplus 1-man life raft and one of the buoyant cushions. The other life preservers and cushions were lost at the time of the accident.

39. (a) Martin Vosburgh, Port Bay, Wolcott, New York  
Mrs. Pat Lupiani, Port Bay, Wolcott, New York  
Mrs. Byer, upon information and belief, also Port Bay, Wolcott, New York.  
Upon information and belief, the craft and plight of the passengers of the sailboat was observed by others in the area as well.
- (b) 5:15 p.m. and time subsequent leading to ultimate submersion and disappearance of the deceased's body after an unsuccessful attempt to rescue at approximately 8:30 p.m. Upon information and belief, observed by others in the area as well, but same is unknown by your deponent at this time.
40. Coast Guard station was closer to capsized boat than witnesses and was more readily visible from said Sodus Point Coast Guard Station. Witnesses assumed Coast Guard would attempt rescue since the boat was within sight of the Coast Guard station and obviously in distress. The Coast Guard holds itself out to the public as follows:  
"The Coast Guard performs any and all acts necessary to rescue and aid persons and save property placed in jeopardy due to marine and aircraft disaster..." (From "The Budget of the United States Government - Fiscal Year 1971")
41. The Coast Guard made no response or attempt to rescue the parties on the capsized boat, even though they were in a position readily visible from the Coast Guard station. Nothing was done by the Coast Guard to assist the capsized parties until after the State Police called the Coast Guard station.
42. (a) Upon information and belief, Martin Vosburgh and/or Mrs. Pat Lupiani, made said telephone call; addresses as aforementioned.  
(b) Upon information and belief, the Sodus Station Watch Officer participated in said phone call on behalf of the Coast Guard. His name is not known, but is within the knowledge of the defendant. This information is more peculiarly within the knowledge of the Coast Guard personnel.
43. Situation of the capsized boat and its passengers was described to the watch officer with reference to location of the boat. Upon information and be-

## Bill of Particulars.

lief, the watch officer represented that something would be done to attempt the rescue of the parties. This information is more peculiarly within the knowledge of the Coast Guard personnel.

44. (a) Upon information and belief, Martin Vosburgh, Port Bay, Wolcott, New York and/or Mrs. Pat Lupiani, upon information and belief, Port Bay, Wolcott, New York.
  - (b) Upon information and belief, the police dispatcher. This information is more peculiarly within the knowledge of the New York State Police.
  - (c) Upon information and belief, advised of situation regarding capsized boat and passengers and failure of Coast Guard personnel to respond to their call. Upon information and belief, the New York State Police Department stated they would contact the Sodus Point Coast Guard Station regarding said situation.
45. (a) Unknown at this time; police dispatcher is believed to have made the call.
  - (b) Upon information and belief, the Station Officer in charge of the Sodus Point Coast Guard Station participated in said conversation. This information is more peculiarly within the knowledge of the participants of said conversation.
  - (c) Unknown, said conversation is peculiarly within the knowledge of the Coast Guard and New York State Police Department.
46. (a) Unknown; upon information and belief, may have been unconscious; had suffered loss of hearing and sight to some extent; state of exhaustion.
  - (b) Unknown.
  - (c) Statements and descriptions by other passengers on the boat and witnesses.
47. (a) Yes.
  - (b) The Coast Guard employees were negligent and failed to take proper steps in attempting rescue, such that the body of deceased slipped from the life jacket when Coast Guard personnel attempted to make recovery and the body became submerged and disappeared from sight such that he died.
48. Upon information and belief, yes.
49. Upon information and belief, the civilians on the shore made no attempt at rescue themselves upon initial observation of the capsized craft and passengers since they were more easily within the sight of the Sodus Point Coast Guard Station and it was

## Bill of Particulars.

assumed that a rescue attempt would, therefore, be made. After calling the Coast Guard on the phone, no attempt at rescue was made by the civilian observers since they felt that the Coast Guard personnel would act based upon representations made by the Coast Guard employees that something would be done to attempt rescue. Nothing was done, however, until some time later when the State Police were finally able to prompt some action on the part of the Coast Guard personnel. They further relied on the Coast Guard to attempt to rescue Mr. Kelly in a proper manner; however, they were so careless and negligent that the body was lost from the life jacket which had been keeping him afloat such that it disappeared beneath the surface of the water.

The Coast Guard holds itself out to the public as follows:

"The Coast Guard performs any and all acts necessary to rescue and aid persons and save property placed in jeopardy due to marine and aircraft disaster..." (From "The Budget of the United States Government - Fiscal Year 1971")

Dated: August 9, 1973

OOT, GREENE, SETRIGHT, HERSHDORFER & SHARPE  
Attorneys for Plaintiff  
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Syracuse, New York 13202  
(315) 422-8231

TO: ANTHONY W. GROSS, Trial Attorney  
Admiralty & Shipping Section  
Department of Justice  
Washington, D.C. 20530

## Bill of Particulars.

STATE OF NEW YORK

COUNTY OF ONONDAGA

CITY OF SYRACUSE

## (PERSONAL VERIFICATION)

ss.

Laurence F. Kelly

being duly sworn

deposes and says that he is the plaintiff  
he has read the foregoing bill of particulars  
and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein  
stated to be alleged on information and belief, and that as to those matters he believes it to be true.

*Laurence F. Kelly*

Sworn to before me, this 9th }  
day of August 19 78 }  
*Thomas W. Ryan*  
Notary Public

THOMAS W. RYAN

Notary Public in the State of New York  
Qualified in Onon. Cu. No. 34-8727390  
My Commission Expires March 30, 19<sup>74</sup>

Appointment of Administrator  
attached to Bill of Particulars.

File No. 70-2622

# The People of the State of New York

To

LAURENCE F. KELLY

*Send Greeting:*

Whereas,

RICHARD C. KELLY

as is alleged, lately died intestate,  
being at or immediately prior to his death, an inhabitant of, or having left assets which  
then were, or have since come within the County of Onondaga, by means whereof the ordering and  
granting administration of all and singular the goods, chattels and credits, of which the said intestate died  
possessed, and also the auditing, allowing and final discharging the account thereof, do belong to our  
Surrogate of the County of Onondaga. And we, being desirous that the goods, chattels and credits, of the said  
intestate shall be well and faithfully administered, applied and disposed of, DO GRANT unto you,  
the said

LAURENCE F. KELLY

full power by these presents, to administer and faithfully dispose of all and singular the said goods, chattels  
and credits; to ask, demand, recover and receive the debts which unto the said intestate, whilst living and  
at the time of his death did belong; and to pay the debts which the said intestate did owe, as far as such  
goods, chattels and credits will thereunto extend and the law require; hereby requiring you to make, or cause  
to be made, a true and perfect inventory of all and singular the goods, chattels and credits of the said intestate  
within a reasonable time, and return a duplicate thereof to our Surrogate of the County of Onon-  
daga, within three months of the date of these presents: and if further personal property or assets of any  
kind, not mentioned in any inventory that shall have been so made, shall come to your possession or know-  
ledge, to make, or cause to be made, in like manner, a true and perfect inventory thereof, and return the  
same within two months after discovery thereof.

And we do, by these Presents, depute, constitute and appoint you, the said

LAURENCE F. KELLY

administrator or of all and singular the goods, chattels and credits which were of the said  
deceased.

RICHARD C. KELLY

But as to the Cause of action mentioned in the petition herein; these letters are limited to the prosecution of such action or actions as you, the said Administrator or  
may be entitled to prosecute by special provision of law; and you are hereby restrained from compro-  
mising any such action or cause of action and from the enforcement of any judgment that may be re-  
covered thereon by you as such administrator or until the further order of the Surrogate on addition-  
al satisfactory security pursuant to Section 702 & 801 of the Surrogate's Court Procedure Act.

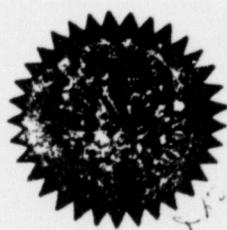
In Testimony Whereof, We have caused the seal of the Surrogate's

Court of the County of Onondaga to be hereunto affixed.

RICHARD N. GALE, Temporary Acting

Witness, HON. RAYMOND WOOD, Surrogate of our said  
County of Onondaga, at the City of Syracuse, in the said County, the

23rd day of December A. D. 19 70



V. of Baldwinsville

*Richard N. Gale* Temporary Acting  
Surrogate

26  
INTERROGATORIES PROPOUNDED BY PLAINTIFF  
TO DEFENDANT.

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

LAURENCE F. KELLY, as Administrator of  
the Estate of RICHARD C. KELLY,

Plaintiff,

Civil Action No:  
73-CV-106

-vs-

UNITED STATES OF AMERICA,

Defendant.

INTERROGATORIES PROPOUNDED BY PLAINTIFF  
TO DEFENDANT

Plaintiff propounds the following interrogatories  
to be answered under oath by defendant within thirty (30) days  
after service hereof in accordance with Rule 33 of the Federal Rules  
of Civil Procedure:

1. As to the Coast Guard personnel who were on duty  
at the Sodus Bay Coast Guard Station on September 3, 1970, and  
September 4, 1970:

a) Identify each as to name, title, address,  
age, and length of service with the Coast Guard;

b) State the hours of duty of each on September  
3rd and 4th, 1970;

c) Identify as to name, title, address, age, and  
length of service any other Coast Guard personnel who, though not  
necessarily on duty, participated in or took part in any respect  
in the activities and incident which is the subject of this law  
suit.

Interrogatories Propounded by Plaintiff to Defendant.

2. Identify all Coast Guard personnel who spoke with 1) Martin Vosburgh,

2) Pat Lupiani;

a) With respect to each, state the substance of their conversation;

b) State, with respect to each, when said conversation took place;

c) State what action, if any, was taken by any Coast Guard personnel as a result of each conversation.

3. Identify any and all Coast Guard personnel who spoke with any other members of the public.

a) Identify said members of the public with whom they spoke;

b) In respect to each, state:

1) the time when said conversation took place;

2) the substance of the conversation;

3) what action was taken by any Coast Guard personnel as a result of said conversation, and by whom such action was taken.

4. Identify any and all Coast Guard personnel who spoke with any members of the State Police;

a) Identify the members of the State Police with whom they spoke.

## Interrogatories Propounded by Plaintiff to Defendant.

b) In respect to each, state:

- 1) the time when said conversation took place;
- 2) the substance of the conversation;
- 3) what action was taken by any Coast Guard

personnel as a result of said conversation, and by whom such action was taken.

5. State whether recordings are made with respect to in-going or out-going phone calls from the Sodus Bay Coast Guard Station.

- a) If so, are said recordings available, and in existence at this time?
- b) If so, where are they stored?

6. Please state when the Coast Guard personnel were aware of the capsized boat and when they were aware that persons were in the water in the area near the sailboat.

- a) In respect to the above, identify all Coast Guard personnel involved.

7. State what action was taken by any Coast Guard personnel with respect to rescue of the decedent.

- a) Identify all Coast Guard personnel who took part in any attempted rescue of the deceased, Richard C. Kelly;
- b) Identify particularly that person or persons

## Interrogatories Propounded by Plaintiff to Defendant.

who attempted to retrieve the body when it slipped from the life preserver and was lost beneath the water.

8. Identify any and all reports which were made by the Coast Guard and/or the Government personnel, representatives, or agents, relating to this incident.

- a) Identify which such reports were made;
- b) State by whom such reports were made;
- c) State where such reports are kept at the present time.

9. State what action was taken by any of the Coast Guard personnel previously mentioned in any of the above paragraphs whose actions in any respect to this matter have not been previously set forth, if any.

OOT, GREENE, SETRIGHT, HERSHDORFER & SHARPE

By:

Thomas W. Ryan, Esq.

Attorneys for Plaintiff  
Office & P.O. Address  
500 Powelson Building  
Syracuse, New York 13202  
Phone: (315) 422-8231

Interrogatories Propounded by Plaintiff to Defendant.

CERTIFICATION

I hereby certify that a true and correct copy of the within Interrogatories were mailed to the Offices of Gustave J. DiBianco, Attorney for the Defendant, by mailing the same to his office at the Federal Building, Syracuse, New York 13201; and that a true and correct copy of same was mailed to Anthony W. Gross, Esq., Trial Attorney for the Defendant, at his office in the Admiralty & Shipping Section, Department of Justice, Washington, D.C. 20530.

Thomas W. Ryan, Esq.

Dated: January 23, 1975

**DEFENDANT'S ANSWERS TO INTERROGATORIES.**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

LAURENCE F. KELLY, as Administrator :  
of the Estate of RICHARD C. KELLY, :  
Plaintiff, : CIVIL ACTION  
v. : NO. 73-CV-106  
UNITED STATES OF AMERICA, :  
Defendant. :

DEFENDANT'S ANSWERS  
TO INTERROGATORIES

1. (a) James G. Skinner, BM1, c/o Commanding, Coast  
Guard Light Station Coinjock, North Carolina, 34 years old,  
16 years service.

Frank C. Wackerle, EN1, c/o Commanding Officer,  
Cape Sarichef Loran Station, Alaska, 31 years old, 1 $\frac{1}{4}$  years  
service.

Harvey J. Webster, Seaman (discharged), Route 14  
Sodus Point, Wayne, New York 1 $\frac{1}{4}$ 555, 27 years old, discharged  
after 6 years service 11/4/73.

Don Allen Holt, Seaman Apprentice (discharged),  
present address unknown, 28 years old, inactive reserve, 5  
years service.

(b) There was no unit log maintained at Coast Guard  
Station Sodus Point; however, pursuant to the daily routine,  
which was adhered to on the day in question, all personnel  
were at home pending recall after 1600 each day, except for  
the duty watchstander. On September 4, 1970, during the hours  
of 1800 to 2400, SN Webster was the watchstander and all  
other personnel listed in (a) above were recalled to the  
station at 1915 to respond to this SAR call. They remained  
on duty until approximately 2220 that evening.

## Defendant's Answers to Interrogatories.

(c) None.

2. Martin Vosburgh - none

Pat Lupiani - SN Harvey Webster.

(a) This Coast Guardsman was the duty watchstander on September 4, 1970, when Ms. Pat Lupiani called Sodus Point Station. She informed him that a sailboat was in distress west of Port Bay and he requested further particulars from her including the vessel's description.

(b) The call was noted in the station communications log as occurring at 2315Z (1915 local time) on September 4, 1970.

(c) The Officer-in-Charge was immediately notified and he initiated a boat crew recall. The boat crew was assembled at 1919 and was underway at 1920.

Pat Lupiani - BML James Skinner

(a) BML Skinner spoke again with Ms. Lupiani to request more information and to ask her to watch for the flashing blue light of the Coast Guard boat. He assured her that assistance was on the way.

(b) Approximately 1935.

(c) None.

3. None necessary.

4. BML James G. Skinner

(a) Unknown. This information is more peculiarly within the knowledge of the New York State Police.

(b) (1) Approximately 1931. The call was not logged.

(2) The Coast Guardsman explained that a boat had gotten underway to assist at 1920.

## Interrogatories Propounded by Plaintiff to Defendant.

- (3) BMI Skinner called Ms. Lupiani to reassure her that a Coast Guard boat was underway. See answer to interrogatory #2.
5. There were no recordings made of the telephone calls to and/or from the Sodus Point Coast Guard Station.
6. Coast Guard personnel became aware of a capsized sailboat upon receipt of Ms. Lupiani's telephone call.
- (a) See answer to interrogatory #2(a).
7. Upon receipt of Ms. Lupiani's telephone call, the boat crew was recalled and at 1920 was underway to assist. The boat arrived on scene at approximately 1950 and after assisting in the rescue of three persons, not parties to this action, the Coast Guard boat commenced to search for the plaintiff's decedent. His body was located at approximately 2030, about a foot below the water supported only by a life jacket. When retrieval of the body was attempted the life jacket slipped loose and the decedent's body sank. Dragging operations were continued until approximately 2130 when weather, sea and light conditions forced their curtailment.
7. (a) See answer to interrogatory #1.
- (b) SA Don A. Holt  
SN Harvey J. Webster
8. (a) An investigation was made of the circumstances attendant to this loss of life and a report was filed.  
(b) CWO-2 (BOSN) William M. Dukes, USCG.  
(c) This report is presently kept in the Office of the Chief Counsel of the Coast Guard, (G-LCL/81, Washington, D.C.)
9. None, if we understand the question asked.

Interrogatories Propounded by Plaintiff to Defendant.

JAMES M. SULLIVAN, JR.  
United States Attorney  
Syracuse, New York 13201

By Assistant United States Attorney

*Alfred H.O. Boudreau*  
ALFRED H.O. BOUDREAU, JR.  
Admiralty & Shipping Section  
Department of Justice  
Washington, D.C. 20530

CERTIFICATE OF SERVICE

I hereby certify that on this 20<sup>th</sup> day of February, 1975, I deposited in the United States mails a copy of the foregoing answers to interrogatories addressed to:

Thomas W. Ryan, Esquire  
OOT, GREENE, SETRIGHT, HERSHDORFER  
& SHARPE  
500 Powelson Building  
Syracuse, New York 13202

*Alfred H.O. Boudreau*  
Alfred H.O. Boudreau, Jr.

## NOTICE OF MOTION.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

LAURENCE F. KELLY, as Administrator  
of the Estate of RICHARD C. KELLY,  
Plaintiff | CIVIL ACTION NO. 73-CV-106  
vs | NOTICE OF MOTION  
UNITED STATES OF AMERICA, |  
Defendant |

SIRS:

PLEASE TAKE NOTICE that on March 24, 1975, at ten o'clock  
in the forenoon, or as soon thereafter as counsel can be heard,  
in the United States District Court, Federal Building, Utica,  
New York, Defendant United States of America will move this  
Court for an Order dismissing the above-entitled action.

JAMES M. SULLIVAN, JR.  
United States Attorney  
Federal Bldg., Syracuse, N. Y. 13201  
Attorney for United States  
of America

By GUSTAVE J. DiBIANCO

Gustave J. DiBianco  
Assistant U. S. Attorney

TO: Hon. Joseph R. Scully  
Clerk, U. S. District Court  
Federal Building  
Utica, New York 13503

OOT, GREENE, SETRIGHT, HERSHDORFER & SHARPE, ESQS.  
500 Powelson Building  
Syracuse, New York 13202  
Attn: Thomas W. Ryan, Esq.

Hon. Edmund Port  
U. S. District Judge  
Fed. Cthse. & Post Ofc. Bldg.  
Auburn, New York 13021

**MOTION TO DISMISS.**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

LAURENCE F. KELLY, as Administrator :  
of the Estate of RICHARD C. KELLY, :

Plaintiff, : CIVIL ACTION  
: NO. 73-CV-106

v.

UNITED STATES OF AMERICA, :

Defendant. :

**MOTION TO DISMISS**

Pursuant to Fed. R. Civ. P. 12(b)(1) and (h)(3)  
defendant moves to dismiss the instant action because this  
Honorable Court lacks jurisdiction of the subject matter, all  
as explained particularly in the accompanying memorandum in  
support.

Respectfully submitted,

JAMES M. SULLIVAN, JR.  
United States Attorney  
Syracuse, New York 13201

By

Assistant United States Attorney

*Alfred H.O. Boudreau, Jr.*

ALFRED H.O. BOUDREAU, JR.  
Admiralty & Shipping Section  
Department of Justice  
Washington, D.C. 20530

## TRANSCRIPT OF PROCEEDINGS, dated 4-14-75.

1

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

- - - - -  
- LAWRENCE F. KELLY, ETC.  
- - - - -

- - - - -  
- against -  
- - - - -

- UNITED STATES OF AMERICA  
- - - - -

73-CV-106

The following proceedings took place on the 14th day  
of April, 1975, at the United States District Court,  
Federal Building, Syracuse, New York, before HONORABLE  
EDMUND PORT, United States District Judge.

A P P E A R A N C E S:

OOT, GREENE, SETRIGHT, HERSHDORFER & SHARPE, ESQS.  
JERROLD P. O'BRIEN, ESQ.  
Of Counsel  
Attorney for Plaintiff  
500 Powelson Building  
Syracuse, New York 13202

JAMES M. SULLIVAN  
United States Attorney  
ALFRED H. BOUDREAU, JR.  
Of Counsel  
Attorney for U.S.A.  
Federal Building  
Syracuse, New York

Transcript of Proceedings, dated 4-14-75.

2

THE CLERK: Lawrence F. Kelly,etc. against the  
United States of America.

MR. O'BRIEN: Ready.

MR. BOUDREAU: Ready for the Government.

THE COURT: All right, proceed, Mr. Boudreau.

MR. BOUDREAU: May it please the Court, the  
case of Kelly versus United States is here on the  
Government's motion to dismiss. Plaintiff's decedent  
drowned as a result of a sailboat capsizing on Lake  
Ontario on September 4, 1970.

The complaint in this case is brought by his  
administrator was filed on March 13, 1973. It is  
the Government's contention that the case is absolutely  
barred by the running of the statute of limitations.  
That proceeds from these premises. Lake Ontario, as  
the Supreme Court said many years ago is a navigable  
water of the United States. Consequently the injury  
or the death is in admiralty.

The only statutes which authorize suit against  
the United States in admiralty matters are suits in  
the admiralty act and the Public Vessels Act.

This suit was brought under the Tort Claims Act.

Section 2680 of Title 28 of the United States  
Code provides that the Tort Claims Act is inapplicable  
to any suit which could be brought under either the

suits in admiralty act or the Public Vessels Act.

Now plaintiff in response to our motions says that the Federal Tort Claims Act has been applied in the past to admiralty matters, and that is so, but all the cases he cites except one, which is not material to the discussion here, were decided before September 13, 1966, on which date the suit in the Admiralty Act was amended.

I am taking the liberty here of providing Your Honor with a copy of 46 USC 742. Do you see that, sir?

THE COURT: Yes, I am familiar with it.

MR. BOUDREAU: Perhaps I am debating the matter too much.

THE COURT: No, I am familiar with the section. You are talking about the amendment enlarging the scope of the --

MR. BOUDREAU: No, sir, not that one, that is the extension act which is 740, I believe. In section 742, beginning in the second line, these words were added: "Or if a private person or property were involved." Now before this statute, suits in admiralty and the Public Vessels Act dealt only with cases where vessels or their cargoes were involved, and consequently in such cases -- as a notable example,

the Supreme Court in the Indiana Towing case, 350 United States, it was possible to sue the United States for negligence of the Coast Guard under the Federal Tort Claims Act, but that has not been possible, we submit, since this language was inserted in the statute.

Now I have handed up to Your Honor for his consideration two cases, one of which is a decision of the Southern District of Ohio, 1965 and another which is a decision of the Central District of California, 1972. In both of those cases a suit for a maritime tort was brought under the Federal Tort Claims Act, and the court in both cases held the Federal Tort Claims Act did not apply, suits in Admiralty Act applied, and therefore the complaint should be dismissed. And the reason it should be dismissed is that the statute of limitations in the suits in Admiralty Act and in the Public Vessels Act by incorporation is very strict, as the Supreme Court said in the McMAYIN case, which we cited in our motions, the statute runs from the time of injury or death in this case and it is not tolled otherwise, nothing interrupts the running of it.

In the State Marine case, a decision of the Second Circuit which we cited also in our motion, the

Second Circuit said that this statute, which is 28 USC 745 cited in -- I am sorry, 46 USC 745 cited in our brief, is to be distinguished from other statutes of limitation which when they run merely render a claim unenforceable. Under the statute of limitations of the suits in Admiralty Act, said the Second Circuit, the statute once it has run extinguishes the claim.

Some other citations could be cited, and in fact I have cited them in my brief, and for these reasons the suit is brought, and it is in the language of the Second Circuit, extinguished.

MR O'BRIEN: May it please the Court, I read Chapter 20, Title 46, Section 740 as defining admiralty jurisdiction to include injury caused by a vessel on a navigable water --

THE COURT: Let me see if we are in accord here. If there is a remedy in admiralty under the Public Vessels Act or the Suits in Admiralty Act, then there is no argument, is there?

MR. O'PRIEN: That's correct.

THE COURT: It is barred by the Tort Claims Act just as an assault is barred. So what we have got here, or the confined question here is under the facts alleged in your complaint is there a suit which is cognizable under the Federal Tort Claims Act?

MR. O'BRIEN: That's correct.

THE COURT: Now why is it?

MR. O'BRIEN: Sections 740 defines admiralty and maritime jurisdiction as including injury to person or property caused by a vessel on navigable waters, and there is no allegation in our complaint that the injury was caused by a vessel owned by the United States on a navigable water. The allegations of the complaint are that the Coast Guard personnel were negligent in either non-feasance or mis-feasance in engendering reliance on other rescuers and not going out and rescuing Mr. Kelly, and when Mr. Kelly and other people were overboard when it capsized, that is the gravamen of our complaint, and there are certain cases cited in our brief here --

THE COURT: Well, as Mr. Boudreau points out, however, aren't all of the cases cited by you prior to the 1966 amendment, with one possible exception?

Did you cite the Peterson case?

MR. O'BRIEN: I don't believe I did, Your Honor.

THE COURT: Well, that case --

MR. O'BRIEN: I still don't believe that all Maritime Torts are included in admiralty jurisdiction. The Supreme Court not only in the Indiana Towing Company case, but in Hess against United States,

361 U.S. 314 and several other cases, it is recognized that Maritime Torts under the Federal Tort Claims Act -- I don't think it was the intention of Congress to exclusively place all maritime torts under the Maritime Admiralty and maritime jurisdiction, or they would have said so. They included injuries caused by a vessel, that's all.

THE COURT: Well, I don't think either one of you cite it, but a 1967 case in the First Circuit, United States against some Fishing Corporation, that was a rescue case, and it is the closest I have come to your rescue case, and it was a question of whether the party rescued has -- had been misled, and whether they had been induced to place reliance on the fact that the Coast Guard was coming out to rescue them. Now the fact there was a ship now involved is there, but the crux of the negligence, the duty that the Court said was violated, was the duty to give a warning that the person on the vessel that they were sending out was unfit. So the negligence basis of the lawsuit was the failure to send out a properly manned vessel. They sent a vessel out in command of an officer who relied on an instrument, a sophisticated instrument that detected a light, and as a result his bearings were knocked way off and he ran ashore, a

hawser broke, they had a lot of trouble, but they didn't charge him with any negligence in making the rescue, they charged him with negligence in the duty that was violated which was to give a warning that it was unfit.

In your case you find a duty to proceed promptly to a rescue.

MR. O'BRIEN: Not exactly.

THE COURT: Or to not deter others from proceeding to perform a rescue.

MR. O'BRIEN: The facts are not clear even to me at this point, I just got into this case, but it appears to us that the Coast Guard induced a reliance on the part of other people who would have gone out to rescue those people, that they were going to go out and rescue them, and so it is malfeasance or nonfeasance.

THE COURT: But your big distinction is it is caused on land.

MR. O'BRIEN: The Federal Tort Claims Act says negligence caused by an -- employees, and admiralty is caused by a vessel.

THE COURT: A vessel is a dumb thing, a vessel does what its officers and crew tell it to do.

MR. O'BRIEN: Exactly.

THE COURT: I think I find a greater problem in your case in the fact that it was a little sailboat, but I am having trouble there because after --what do you do, draw the line at a 24 foot sailboat? Certainly it is a pleasure craft, that has nothing to do with it because you get boats like Onassis, they are still pleasure boats.

I am very troubled by this case, very frankly. The fact that it happened on land doesn't help us much.

You have got the case in Brooklyn where a car was sprayed with paint from painting an airplane carrier. The wind drifted the paint off onto a parking lot, it was off the pier. They brought suit under the Federal Tort Claims Act and it was dismissed, it was an admiralty case and had admiralty jurisdiction, so that apparently just being at sea is not enough to make it admiralty. Being on land is not enough to exclude from admiralty. I don't know what the delineation is, but it seems to me that there is another case that was troublesome, and this came after the amendment, where the Coast Guard apparently is supposed to examine cargo, this is on the Great Lakes, too. They go on board, and this cargo is too hot, the temperature is up above what

it should be, and they permitted it to continue to on its journey. It catches on fire. A claim is brought under the Tort Claim Act. Now there of course the Coast Guard Vessel had nothing to do with it, it was the people that inspected it. They could have been inspectors, I suppose, but I think the problem overall is that this is probably one of those cases where almost the very nature of the whole operation smacks of the sea. It is a rescue in the water, and I recognize how you are breaking it off, or attempting to break it off by reliance on that sort of thing, but the cases I have just talked about lead me to believe that that isn't enough, that if this happened in the ocean --

MR. BOUDREAU: If I may, I have collected in my brief a number of cases, cited them in a footnote, and if the impact of the tort such as the death of the man occurs on navigable waters, then even though it proceeds from some action or lack of action ashore, then the case is still an admiralty matter.

THE COURT: Well, I don't think it is quite as simple as that, because then you get into your swimming cases.

MR. BOUDREAU: Well, yes.

THE COURT: It is a murky area, the whole area is,

it could be a harsh result there is no question about it. If it were to be dismissed.

MR. BOUDREAU: If I could I would like to say something about that. Perhaps Your Honor is familiar with the executive jet case in the Supreme Court.

THE COURT: Of course they sued in both courts, executive jet protected themselves all the way around.

MR. BOUDREAU: Because it was an airplane that landed in a lake it was held not to be admiralty, and the supreme court said it is not enough to have the locus in the water, but there must be a maritime access and connection between the tort and traditional admiralty jurisdiction, but a drowning at sea, that is the classic case of a maritime.

MR. O'BRIEN: No, Your Honor, clearly that it -- that can't be so, because all the cases we have cited and which counsel has agreed his only argument is after the amendment, they don't apply.

THE COURT: I think they would have been maritime, but the United States would not have been liable.

MR. BOUDEAU: That's right.

THE COURT: You got into a different question, it became unimportant, just as this case, had this case been presented to me within the two year period with

the necessary administrative foundation having been laid, I would pay no more attention to the jurisdictional argument, because I would have it one way or the other. If it came under the Public Vessels, I would say what difference does it make, one or the other, as courts usually avoid problems they don't have to meet, we would say in the classic language, we will leave that for another day, but I am inclined to think that this cannot be let go for another day, this must be resolved, and it is a harsh result, it is one of those cases that at best I think the thing to do is dispose of at the threshold, because Judge Brown said in one of these cases, Gulf Oil against Pan Am Airlines, which would also have been a harsh result, he talked about the lower court was bound to be right because it was so wrong. Maybe that is what this is, maybe this is bound to be wrong because it is so right, but I am going to grant the motion, because this is the underbrush which can be cleared out to the benefit of everybody I feel without going to the expense of a full dress trial.

The motion is granted for lack of jurisdiction.

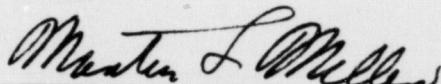
And I trust the plaintiff will pursue an appeal promptly. I can't encourage it strong enough, because it will never get a more appealing case to take

up.

I will endorse the papers, and my decision is incorporated in all the conversation.

\*\*\*\*\*

This is to certify that the foregoing is a true and accurate transcript of the proceedings heard at the time and place noted in the heading hereof.



MARTIN L. MILLER  
Official Reporter  
United States District Court  
Northern District of New York

## NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF NEW YORK

LAURENCE F. KELLY, as Administrator of the  
Estate of RICHARD C. KELLY,

Plaintiff,

NOTICE OF  
APPEAL

vs.

UNITED STATES OF AMERICA,

Civil Action  
No. 73-CV-106

Defendant.

Notice is hereby given that Plaintiff, LAURENCE F. KELLY,  
as Administrator of the Estate of RICHARD C. KELLY, Plaintiff above  
named, hereby appeals to the United States Court of Appeals for the  
Second Circuit from the Order dismissing the Complaint entered in  
this action on the 14th day of April, 1975.

Dated: April 23, 1975

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